



The Bank Account Preservation Procedure in the European Union Regulation (EU) No 655/2014 of the European Parliament and of the Council 15 of May 2014

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ABSTRACT: 1. Regulation No 655/2014 and the need for its existence, 2. The scope and conduct of the preservation of bank accounts procedure, 3. Critique and Conclusion

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1. The Regulation No 655/2014 and the need for its existence

The Regulation that aims to establish a European decision-making procedure of account preservation in order to facilitate cross-border debt recovery in civil and commercial matters was published on 27 June 2014¹. This new Regulation aims to be a “fast track” for the effective judicial recovery of claims of debt-holders claims and help remedy gaps jeopardizing the proper functioning of the market and threatening the interests of both businesses and consumers. This legal instrument of the Union is binding and directly applicable, thus establishing a new procedure that, in cross-border cases, enables the efficient and timely preservation of funds held in the bank accounts of debtors.

There are already several instruments in the European Union to define the powers of the courts to recognize and enforce judicial decisions, as well as cooperation mechanisms between courts in civil procedures. For example, the European order for payment procedure² “establishes a mechanism which enables the rapid recovery of cross-border claims”³. As stated in recital 6 of this Regulation on the order for payments procedure “the swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for economic operators in the European Union, as late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized enterprises, and resulting in numerous job losses”. However, despite being a procedure that makes it simple and fast to acquire an enforceable title and an important milestone for simplifying, accelerating and reducing the costs of litigation in cross-border cases, it is desirable that this enforceable title is enforced in an effective manner in order to compensate the creditor – the ultimate goal of the order for payment procedure. However, as regards measures to enforce claims, in the European Union, we see completely different levels of efficiency depending on the Member State concerned, and such discrepancies eventually distort competition among companies. This is because legal regimes for the implementation of enforceable titles are very different among Member States.

Indeed, the legislation on the enforcement of payment procedures is often considered the “Achilles heel” of the European Civil Judicial Area. Given the importance and novelty of the subject we considered it a relevant subject to write about, despite the fact that this new Regulation only comes into force as of 18 January 2017. In reality, “[under existing] Community instruments, it is not possible to obtain a bank attachment which can be enforced throughout the European Union”⁴. We can even state that until 27 June 2014 a tangible protective

1 Regulation (EU) No 655/2014 of the European Parliament and of the Council, of 15 May 2014.

2 Regulation (EC) No 1896/2006 of the European Parliament and of the Council, of 12 December 2006, (European order for payment procedure) by which it is possible to obtain an enforcement order, enforceable in any legal system, with the exception of Denmark. This European order for payment procedure neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims in Member States, or to harmonize the laws of each of them. Hence, it is only an “additional and optional means for the claimant, who remains free to resort to a procedure provided for by national law” - recital 10 of this Regulation.

3 Joana Covelo de Abreu, “O Procedimento Europeu de Injunção de Pagamento: Solução Simplificada de Cobrança de créditos Transfronteiriços?”, 14, in *Anuário Publicista da Escola de Direito da Universidade do Minho – Ética e Direito*, Tomo II, Ano de 2013.

4 Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts, 3 - (our interpolation).

measure for the implementation of a court decision declared enforceable in another Member State has yet to be presented, and that any such measures were (and still are) governed solely by national law. Now the path is trodden and finally as of 2017, this Regulation is directly applicable and binding on all Member States except the United Kingdom and Denmark, introducing a set of very important innovations in terms of civil and commercial disputes.

On 24 October 2006, through the “Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts”⁵, the Commission launched a consultation on the need for a uniform European procedure for the preservation of bank accounts and the possible characteristics of such a procedure.

In fact, the existing national rules on enforcement of payment procedures have not allowed an effective and speedy cross-border debt recovery. As noted above, legal systems with different procedural requirements were identified in the Member States, all in addition to the known language barriers involving very high translation costs and delays that are not compatible with the urgency that this type of process requires.

In the Stockholm Program of December 2009⁶, establishing priorities in the area of freedom, security and justice for 2010-2014, the European Council invited the Commission to assess the need and feasibility of certain provisional, including protective, measures in the European Union. It was asked to think of measures to prevent the disappearance of assets before the enforcement of an order, and to put forward appropriate proposals for improving the efficiency of the enforcement of claims in the EU regarding bank accounts and debtors' assets. This programme determined that in the preparation of such measures, account should be taken on the impact they will have on the right to privacy and the right to the protection of citizens' personal data⁷, in order to protect them from possible abuses – therefore this Regulation provides, as we shall see, ways to balance the interest of the creditor in obtaining an order, as well as the interest of the debtor in preventing abuse of the order. Recital 44 of this regulation states that it “respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for private and family life, the protection of personal data, the right to property, and the right to an effective remedy and to a fair trial as established in Articles 7, 8, 17 and 47 thereof respectively.”

There are other tools that should be seen as complementary to the new regulation, such as Regulation No. 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁶, Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of

5 The Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (presented by the Commission) {SEC(2006) 1341}, Brussels, 24.10.2006, COM (2006) 618 final, is available in the following website:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0618:FIN:EN:PDF> 6 The Stockholm Programme — an open and secure Europe serving and protecting citizens (2010/C 115/01), OJ C 115, 4.5.2010, 1, available in this link :

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF> 7 Stockholm Programme, 16

6 Regulation (EC) No 44/2001 of the Council, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, 1.

documents), and repealing Council Regulation (EC) No 1348/2000⁷, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 21 2004, creating a European Enforcement Order for uncontested claims⁸.

Regarding Regulation (EC) No 805/2004, Article 1 states that it aims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and implementation, and under the heading “Abolition of *exequatur*”, Article 5 states that “[a] judgment which has been certified as a European Enforcement

Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.” Moreover, in fact, a decision on an uncontested claim may be certified as an Enforcement Title, but only if the court proceedings in the Member State comply with certain procedural requirements, as we will see later in this work.

Also, it must firstly be pointed out that Regulation No 44/2001, on the recognition and enforcement of judgments, like the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, of 27 September 1968⁹, is not intended to unify the procedural rules of the Member States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in relations between Member States and to facilitate the enforcement of judgments.¹⁰

Regulation No 1215/2012 of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, comes precisely to establish measures to facilitate the circulation of judgments in the European Union area, reinforcing the judiciary cooperation in order to ensure access to justice for all citizens, consolidating the principle of mutual recognition of decisions in civil matters with cross-border impact so as to promote, swiftly and effectively, the proper functioning of the internal market. This Regulation Already entered into force into force on 10 January 2015.

According to the *Denilauer* Judgment delivered by the Court of Justice of the European Union (hereinafter ECJ)¹¹ it was once decided that Regulation (EC) No 44/2001 (Brussels I) does not ensure that a protective remedy such as a banking preservation obtained *ex parte* is recognisable and enforceable in a Member State other than the one where it was issued.

Therefore, debtors can move their monies almost instantaneously from accounts known to their creditors to other accounts in the same or another Member State, but on the other hand, creditors are not able to block these monies with the same degree of swiftness.

This demonstrates the insufficiency of the mechanisms in place, wherefore the

⁷ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 79.

⁸ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 21 2004, creating a European Enforcement Order for uncontested claims, OJ L 143, 15.

⁹ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, of 27 September 1968, OJ 1972, L 299, 32; EE 01 F1, 186.

¹⁰ Judgment *Hypoteční banka a. s.*, 17 November 2011, Case C-327/10, recital 37, and Judgement *Denilauer*, 21 May 1980, C-125/79, recital 44.

¹¹ Judgement *Denilauer*.

beginning of this new era that lies ahead, carries with it a new hope for all European Union citizens who are unable to claim and recover their credits, while knowing full well that the debtor has bank conditions for this.

Thus, once the European preservation of bank accounts order enters into force, creditors will be more effectively protected. We therefore consider that this R regulation is a significant step forward in building a fairer and more balanced European area.

2. The scope and conduct of the preservation of bank accounts procedure

According to recital 6 of the Regulation here at issue, “[the] procedure established by this Regulation [should] serv[e] as an additional and optional means for the creditor, who remains free to make use of any other procedure for obtaining an equivalent measure under national law.”

This Regulation covers all civil and commercial matters, with the exception of claims against debtors in insolvency proceedings. This means that a preservation order against the debtor cannot be issued once insolvency proceedings have been opened in relation to him within the meaning of Regulation (EC) No 1346/2000 of the Council. It shall also not affect revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*), rights in property arising out of a matrimonial relationship (or relationship’s with comparable effects) or arising from wills and succession, including maintenance obligations arising by reason of death. Also excluded from the scope of this Regulation are the claims arising from social security and arbitration proceedings.

Thus, as to all other matters that are not excluded, the creditor can request a preservation order in the following situations (Article 5 of Regulation No 655/2014):

- (i) before the creditor initiates proceedings in a Member State against the debtor on the substance of the matter, or at any stage during such proceedings up until the issuing of the judgment or the approval or conclusion of a court settlement;
- (ii) after the creditor has obtained a judgment in a Member State , court settlement or authentic instrument which requires the debtor to pay the creditor’s claim .

The great advantage of this legal mechanism resides in the first point (i), for the creditor can maintain the safeguarded hypothesis of reimbursement of its credit by preserving the account of the debtor, even when the creditor has not yet obtained a judgment, court settlement or authentic instrument, effectively attesting the credit and its amount. Therefore, a situation of this nature amounts to a huge advantage for creditors because through this mechanism they are now able to preserve the bank accounts of debtors, even without first having obtained a judgment attesting their credit. As we shall see, a high likelihood to succeed on the substance of his claim against the debtor is enough.

The competent court to enforce this preservation order will vary depending on whether or not a judgment, court settlement or authentic instrument already exists, and whether the debtor is a consumer, in accordance with the provisions of Article 6 of Regulation No 655/2014.

Where the creditor has applied for a preservation order before initiating proceedings on the substance of the matter, he shall initiate such proceedings and

provide proof of such initiation to the court with which the application for the preservation order was lodged within 30 days of the date on which he lodged the application, otherwise the preservation order shall be revoked or shall terminate (Article 10 of Regulation No 655/2014).

For purposes of calculating time limits provided in the Regulation, recital 38 states that Regulation (EEC, Euratom) No 1182/71 of the Council¹² should apply.

The regulation provides ways to balance the creditor's interest in obtaining a decision and the interest of the debtor to prevent abuse of the order. Therefore, since we are addressing prevention orders, which moreover according to Article 11 of Regulation No 655/2014 are not notified to the debtor, nor is he heard prior to their issuing, the court to which the application is made has to ensure (and it can only do so with what is brought to its attention) the high probability of the creditor to succeed on the substance of his claim against the debtor (Article 7 of Regulation No 655/2014). Similarly, in national protective measures, the creditor has to persuade the court of the grounds of its claim against the debtor (*fumus boni iuris*), and that there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult (*periculum in mora*). The court must therefore assess the evidence of the existence of this risk presented by the creditor. "[T]he creditor should be required in all situations, including when he has already obtained a judgment, to demonstrate to the satisfaction of the court that his claim is in urgent need of judicial protection and that, without the order, the enforcement of the existing or a future judgment may be impeded or made substantially more difficult because there is a real risk that, by the time the creditor is able to have the existing or a future judgment enforced, the debtor may have dissipated, concealed or destroyed his assets or have disposed of them under value, to an unusual extent or through unusual action" (recital 14).¹³

Furthermore, the creditor may request the court for the preservation order to include any interest accrued (calculated under the law applicable to the claim up to the date when the order is issued). If a creditor has already obtained an enforcement title he may request it to include the costs of obtaining such title, to the extent that a determination has been made that those costs must be borne by the debtor (Article 15 of the Regulation).

If the court considers that the evidence provided is insufficient, it may, where national law so allows, request the creditor to provide additional documentary evidence, and – provided that this does is not too dilatory - the court may also use any other appropriate method of taking evidence available under its national law, such as an oral hearing of the creditor or of his witnesses including through videoconference or other communication technology (Article 9 of Regulation No 655/2014). If the creditor fails to complete or rectify the application within that period, the application shall be rejected (Article 17(3), Regulation No 655/2014).

Since the debtor is not heard prior to the issuing of the preservation order, it is possible for the court to require the creditor to provide a security (namely through a security deposit, a bank guarantee or a mortgage, as under national law), but if the court finds the provision of security inappropriate, under the circumstances of the case, it may also be excluded [Article 12(1), Regulation No 655/2014]. This security required by the court is designed to ensure the debtor the possibility to later on require a compensation for any damages that have been caused by the

12 Regulation (EEC, EURATOM) No 1182/71 of the Council of 3 June 1971 on determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, 1).

13 Our interpolation.

preservation order. The creditor is liable for any damage resulting from the order due to fault on his part. However, the burden of proof lies with the debtor (Article 13 of Regulation 655/2014). The law applicable to the creditor's liability is the law of the Member State of enforcement, the Member State in which the bank account to be preserved is maintained [Article 4(12), Regulation 655/2014], except when bank accounts are preserved in more than one Member State, in which case it shall be the State of his or hers habitual residence (as defined in Article 23 of Regulation (EC) No 864/2007) or, failing that, the State with the closest connection with the case.

If the creditor has reasons to believe that the debtor holds one or more accounts with a bank in a specific Member State, but ignores their identification data, the creditor may request the court with which the application for the preservation order is lodged to request the competent information authority¹⁴ the necessary information to identify them. The request must be substantiated, namely with the reasons why he believes that the debtor holds one or more accounts with a bank in a specific Member State and all relevant information available to him about the debtor and the account(s) to be preserved.

Where, as a result of the unavailability of account information, the application for a preservation order is rejected in full, the requesting court shall without delay release any security that the creditor may have provided [Article 14(7) of Regulation No 655/2014].

The court has very short time-limits to decide on the application for a preservation order of bank accounts, as provided by Article 18 of the Regulation. If the creditor has not yet obtained a judgment, court settlement or authentic instrument, the court shall issue its decision by the end of the tenth working day after the creditor lodged or, where applicable, completed his application. If a creditor has already obtained the enforceable title, the court shall issue its decision by the end of the fifth working day after the creditor lodged or, where applicable, completed his application. If the court determines that an oral hearing of the creditor and, as the case may be, his witness(es) is necessary, the court shall hold the hearing without delay and shall issue its decision by the end of the fifth working day after the hearing has taken place. If the court has ruled that the creditor has to provide a security in accordance with Article 12, the court shall issue its decision on the application for a preservation order without delay once the creditor has provided the security required.

In order to facilitate the implementation of the Regulation, the use of standard forms was established, in particular, for the application of an order, the preservation order itself, the declaration concerning the preservation of bank accounts as well as the application for a remedy or appeal on the decision.

The creditor has the right to appeal against any decision of the court rejecting, wholly or in part, his application for a preservation order, and the appeal shall be lodged within 30 days of the date on which the decision was brought to the notice of the creditor (Article 21 Regulation No 655/2014). This right to appeal does not preclude the possibility of the creditor to making a new application for a preservation order on the basis of new facts or new evidence gathered in the meantime (recital 22).

All documents submitted by the creditor to the court in the Member State of origin and the necessary translations, are served on the debtor after the order is

¹⁴ As provided in Article 50(1)(b) of Regulation No 655/2014, all Member States bound by the Regulation shall, until the 18 July 2016, inform the European Commission of the authority designated as competent to obtain account information of alleged debtors.

issued. The court has discretionary powers to append any further documents on which it based its decision and which the debtor might need for his remedy action, such as verbatim transcripts of any oral hearing (recital 31).

The debtor has the right to challenge the preservation order or its enforcement on the grounds provided for in Article 33 of the Regulation and immediately after the implementation of the decision. The debtor may apply for a review of the decision, in particular if the conditions or requirements set out in this Regulation were not met. For example, the debtor may appeal if the preservation order does not constitute a cross-border case, if the creditor does not initiate proceedings on the substance of the matter within the 30 days provided for in this Regulation, or if the creditor's claim was not in need of urgent protection in the form of a preservation order because there was no risk that the subsequent enforcement of that claim would be impeded or made substantially more difficult, or if the provision of security was not in conformity with the requirements set out in the Regulation. A remedy should also be available to the debtor if the order and the declaration on the preservation have not been served on him or if the documents served on him did not meet the language requirements provided for in the regulation. However, such a remedy should not be granted if the lack of service or translation is cured (Article 33(3) of the Regulation).

The preservation of debtor accounts does not affect amounts which are exempt from seizure under the law of the Member State of enforcement, for example amounts necessary to ensure the livelihood of the debtor and his family (recital 36).

A preservation order issued in a Member State in accordance with this Regulation shall be recognised and enforceable in other Member States without any special procedure and without the need for a declaration of enforceability (Article 22 Regulation No 655/2014).

The bank to which the preservation order is addressed must apply it without delay after receiving the decision and must ensure that the amount is not transferred or withdrawn from the account or accounts indicated in the order, incurring in liability for failure to comply with this (Article 24 and 26 of Regulation No 655/2014).

3. Critique and Conclusion

This Regulation can effectively be a powerful weapon against stubborn or fraudulent debtors, but we are not able to know to what extent this weapon will be able to deter those debtors who purposely put themselves in a situation where service is impossible in the declaratory stage of the proceedings, thus being rewarded for it. Examining the *Cornelius de Visser* Judgment, we can observe that the referring court sought to determine whether EU law could be interpreted as precluding certification as a European Enforcement Order within the as set out by Regulation No 805/2004, in a judgment by default issued against a defendant whose address is not known. The ECJ responded that while it is true that a judgment in absentia can be considered as being included among the enforcement titles within the meaning of Article 3 of the Regulation (and therefore likely to be certified as a European Enforcement Order), the absence of objections from the debtor referred to in Article 3(1)(b) of Regulation No 805/2004, can take the shape of default of appearance at a court hearing or of failure to comply with an invitation by the court to give written notice of an intention to defend the case. However, as provided in Article 14(2) of the same Regulation, "service under paragraph 1 is not admissible if the debtor's address is not known with certainty".

Therefore, it derives from the very wording of Regulation 805/2004 that a judgment rendered in absentia whenever it is impossible to determine the domicile of the defendant cannot be certified as a European Enforcement Order. Indeed, the regulation at issue establishes a derogatory mechanism of the common system for the recognition of judgements, whose requirements should be in principle interpreted strictly - concludes the Judgment.

In addition, as described under recital 20 of the Regulation here at issue, “[a]pplication for certification as a European Enforcement Order for uncontested claims should be optional for the creditor, who may instead choose the system of recognition and enforcement under Regulation (EC) No 44/2001 or other Community instruments”.

Furthermore, since Regulation No 655/2014 does not affect other Regulations in effect, we can conclude that concerning the consequences of failure of service, nothing has changed. Neither does Regulation No 1393/2007 apply when the address of the recipient is unknown [Article 1(2)]. We should also continue to consider that a default judgment rendered against a defendant, whose address is not known, should not be certified as a European Enforcement Order within the meaning of Regulation No 805/2004. Namely, if by chance a creditor cannot serve the debtor in the main proceedings it would be rather difficult to obtain the desired enforcement title, which would later lead to a request for preservation of bank accounts in accordance with this new regulation.

And although the service of the debtor is not required in case of a request for a preservation order when an enforceable title already exists (a judgment, court settlement or authentic instrument), the same cannot be said in regards to a request for a preservation order when such a title does not exist. In such cases, the creditor will equally have to resort to the system in place, leading to a “difficult deadlock”; in case the debtor’s address cannot be identified.

Despite this clear difficulty, even after the entry into force of the new regulation, the truth is that for those who already have an enforceable title everything becomes simpler. And for those who do not have an enforceable title, it is also true that through this Regulation the creditor may apply for the preservation of accounts, blocking them, even without a rendered judgment on the substance of the matter. Hence it could be suggested, that this Regulation may prove to be a powerful weapon for the faster recovery of credits, for no debtor will sit back and do nothing while watching the seizure of his accounts. Notice that the debtor will know of the seizure of his accounts without having had an opportunity to challenge the preservation order, because we are dealing with precautionary decisions. Only after the seizure will the debtor be served to challenge and defend himself. Thus, this procedure will cause the most “silent” debtors to make themselves heard and make the missing “appear”. For a preservation order to be issued without a judgment on the substance of the matter, it will suffice that the creditor demonstrates to the court the high likelihood of obtaining a favourable ruling in the main proceedings (even if the debtor has not been served during those main proceedings).

Thus, we can guarantee that from January 2017 debtors will certainly have an increased interest in “appearing” at trial, in order to solve the problems that preservation orders will cause them and there will be more creditors settling their debts.

In fact, before the existence of this Regulation there was no other European procedure that granted the creditor the opportunity to block the bank accounts of an alleged debtor without a judgment on the substance of the matter. Thus, we

advise all EU citizens to organize themselves as much as possible, and as far as documents and accounting are concerned, to facilitate the subsequent demonstration of their claims in court, in advance to the credit, trying to identify the possible existence of bank accounts of the debtor, in order to be reimbursed later on if the payment is not made.

We therefore believe that this Regulation was an important advancement in the construction of the European area of justice and we hope that it will change the paradigm of the enforcement of claims in the European Union.